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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

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# No. 770

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JAY H. TAYLOR,

*Appellant,*

*vs.*

THE KENTUCKY STATE BAR ASSOCIATION

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF KENTUCKY

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## STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

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ELDON S. DUMMIT,
*Attorney General of Kentucky,*
BEN B. FOWLER,
*Assistant Attorney General of Kentucky,*
*Counsel for Appellee.*

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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

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# No. 770

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JAY H. TAYLOR,

*Appellant,*

*vs.*

KENTUCKY STATE BAR ASSOCIATION,

*Appellee*

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## STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS APPEAL

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MAY IT PLEASE THE COURT:

Appellee, believing that the matter set forth will demonstrate the lack of substance in the questions raised by this appeal, files this his statement in opposition to Appellant's statement as to jurisdiction, and includes herein his motion to dismiss the appeal.

The matters here relied upon by appellee are more particularly stated below:

This Court does not have jurisdiction of the Appeal herein, for the reason that the appellant is attempting to bring into issue the validity of a statute of Kentucky under the Federal Constitution; which issue was never raised in

the Kentucky Court of Appeals by the Appellant in the pleadings or otherwise nor was this issue considered in the opinion rendered by the Kentucky Court of highest resort.

The Kentucky Court of Appeals is authorized by Kentucky Revised Statutes, Section 30.170 to establish practice and procedure for disciplining, suspending and disbarring attorneys. Under its inherent power to govern attorneys, who are its officers, and under the authority of the cited statute, the highest Court of Kentucky has promulgated rules governing the procedure to be followed in order to try attorneys for professional misconduct. These rules provide for the disbarment of attorneys when their professional misconduct warrants such serious action, and are set out in full in the Appellant's Statement in Support of Jurisdiction.

The Appellant was tried pursuant to these rules. A Complaint alleging several instances of professional misconduct on the part of the Appellant was duly filed with the Board of Bar Commissioners. The Complaint also alleged that Appellant had been convicted of a felony. Kentucky Revised Statutes 30.100 states that any person who has been convicted of a felony cannot practice law in the state. The appellant filed an Answer which in general denied all the allegations and averred that Kentucky Revised Statutes 30.100, providing that any person convicted of a felony could not practice law in Kentucky, was of no effect since it was in violation of the Federal Constitution. The Board of Bar Commissioners after hearing all the evidence at the trial, found that the Appellant was guilty on two separate and unrelated counts; one of having been convicted of a felony, the other of having lent his aid in the perpetration of a fraud on the Harlan Circuit Court. Accordingly, the Board recommended to the Court of Appeals that the Appellant be permanently disbarred from the further practice of

law in Kentucky. A rule then issued from the Court of Appeals to the Appellant to show cause why the award disbarring him should not be enforced. Appellant filed an Answer and Response in which he set up a defense to the Finding that he was guilty of having been convicted of a felony and which further set out that Section 30.100 of the Kentucky Revised Statutes was void as being repugnant to the Federal Constitution; the Answer and Response further denied his participation in any fraud on the Harlan Circuit Court as an avoidance of the Finding that he was guilty of aiding in the perpetration of such a fraud. In due time the Appellant filed a brief setting out his argument before the Court; he later filed a supplemental brief. Reading these two briefs together it appears that the Appellant's argument followed the issues pleaded in his Answer and Response, and that the only possible federal question raised was that Section 30.100 of the Kentucky Revised Statutes was void as being repugnant to the Federal Constitution.

The Kentucky Court of Appeals in its opinion, which is a part of this record, and is reported as *In Re Taylor,* 300 Ky. 448, 189 S. W. (2d) 403, expressly declined to pass on the question raised by the Finding that the Appellant had been convicted of a felony, deeming the fraud perpetrated on the Harlan Circuit Court alone as sufficient for disbarment. Hence, the question raised as to the constitutionality of Section 30.100 of the Kentucky Revised Statutes was not considered, and the Appellant suffered no prejudice from the operation of that statute. In considering the sufficiency of the alleged fraud of the Appellant for disbarment, the Court properly approached this issue on its merits alone as that was the only question raised by the pleadings or by the arguments.

The Appellant, after the adverse opinion of the Kentucky Court of Appeals was rendered, filed a Petition for Re-hearing. In this petition the Appellant for the first time argued that Kentucky Revised Statutes 30.170, allowing the Court of Appeals to provide for disbarment of attorneys, and that the rules so provided by the Court of Appeals were in violation of the Constitution of the United States. The Court of Appeals, without rendering any opinion or without assigning any reason, overruled the petition.

It is well settled that the Supreme Court of the United States will not consider any appeal from the highest court of a state unless a federal question was presented to the state court, and unless this question was expressly or necessarily decided by the state court. In the case of *Cleveland and Pittsburgh Railroad Company* v. *City of Cleveland*, 35 Sup. Ct. 21, 235 U. S. 50, 59 L. Ed. 127, the Court said:

> "In order to bring a case here * * *, it is well settled that the Federal right must have been set up and adjudicated against the claimant by the judgment of the state court. It is equally well settled that the contention made and passed upon in the state court cannot be enlarged by assignments of error made to bring the case into this court. This proposition is too well settled to need discussion."

The record clearly shows that the only federal question involved in this action was whether the Kentucky Statute prohibiting any person who had been convicted of a felony from practicing law was valid under the Constitution of the United States. This question was expressly left undecided in the determination of the case and is of no more value to the Appellant in fixing the jurisdiction of this court than if it had been considered and decided in the Appellant's favor.

The only question remaining is the effect of the Appellant's Petition for Re-hearing. The attempt was made in this petition to bring into issue the validity of the entire procedure under which the Appellant was tried. Appellant asserted that the statute allowing the Court of Appeals to make rules governing procedure for disbarring attorneys, and that the rules so made by the Court violated his rights under the Fourteenth Amendment to the Constitution of the United States. This petition was overruled without an opinion.

The rule is firmly established that an attempt to assign new errors in a Petition for Re-hearing in a state court which is overruled without an opinion passing on federal questions cannot avail to import such questions into the record so as to sustain a writ of error from the Federal Supreme Court to the state court. *Waters-Pierce Oil Company* v. *Texas,* 212 U. S. 112, 29 Sup. Ct. 227, 53 L. Ed. 431. In the case of *Fullerton* v. *Texas,* 196 U. S. 192, 25 Sup. Ct. 221, 49 L. Ed. 443, the Appellant attempted to raise a federal question for the first time in a Petition for Re-hearing, the state court overruled the Petition and rendered an opinion which made no reference to the federal question. The United States Supreme Court in its opinion therein said:

> "But on the face of the record proper and from the opinions, the reasonable inference is that the court may have denied the application (*for re-hearing*) in the mere exercise of a discretion, or declined to pass on the constitutional question, in terms, because it was suggested too late." (Italics ours.)

The Kentucky Court of Appeals has overruled Petitions for Re-hearing on the express ground that the Petition raises a point not brought in issue or considered by the

Court in its original opinion. *Hazel Green Oil and Gas Company* v. *Collier,* 130 Ky. 132, 112 S. W. 1090.

WHEREFORE, Appellee respectfully submits this statement and moves the Court to dismiss the appeal.

ELDON S. DUMMIT,
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BEN B. FOWLER,
*Assistant Attorney General, Counsel for Appellee.*

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